Supreme Court, U.S.
FILED
MAY 24 2001
CLERK

(2)

No. 00-1637

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

HOMER DYE, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Mingo County, West Virginia

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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May 24, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24 pp

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight

[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party authored this brief in whole or in part.

revenues, and employ 90 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. § 51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. With the goal of providing a progressive and meaningful remedy, Congress lowered the then-existing common law barriers to recovery by abrogating the defenses of assumption of risk, the fellow servant doctrine and contributory negligence.[2] However, where Congress did not specifically alter the common law, the employee's remedy was to be consistent with common law principles.[3]

Subsequent to FELA's enactment, every state has enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. Despite the advent of workers' compensation, FELA remains intact,[4] and

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[2] The defense of contributory negligence is eliminated in favor of comparative negligence by 45 U.S.C. § 53; the assumption of the risk defense by 45 U.S.C. § 54. *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) (FELA abrogated the common law fellow servant doctrine.).

[3] *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543-44 (1994); *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997); *See infra* p. 14.

[4] Under the Jones Act, which incorporates the substance of FELA by virtue of 46 U.S.C. § 688, seamen are covered by a fault-based compensation system. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

each year thousands of claims and lawsuits, like the case below, are asserted under FELA against AAR member railroads.[5]

In this case, the court permitted the plaintiffs, who alleged exposure to asbestos while employed at the defendant railroad, to argue to the jury that they were entitled to compensation for emotional distress resulting from their fear of contracting cancer in the future despite offering no evidence of any physical or emotional manifestation of their "fear." After receiving instructions from the court that it could compensate the plaintiffs for a "reasonable fear of cancer," the jury returned six-figure verdicts for each of five plaintiffs, all of whom were retired and therefore had no claim for lost wages. The court also instructed the jury not to make a deduction for any contribution to plaintiffs' injuries caused by non-railroad exposure (or other potential causes of plaintiffs' injuries), even though with respect to some plaintiffs there was evidence of significant potential exposure to asbestos at other jobs. [*See* Petition at 7] These instructions, denying the right to apportion damages, left the railroad exposed to damages for harm it did not cause.

Both issues on which petitioner seeks review arise with regularity in FELA litigation. Because, unlike workers' compensation employers, railroads are subject to uncapped damages under FELA, the manner in which these issues are addressed by lower courts impacts greatly on the amount of damages a railroad will be obligated to pay. The serious financial consequences that flow from this decision makes this case of utmost interest to AAR and its members.

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[5] From 1995 through 1999, nearly 33,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to AAR by AAR members (and other railroads) in response to annual surveys.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Petition.

SUMMARY OF THE ARGUMENT

The decision by the court below, which pushes railroad liability beyond FELA's intent, presents squarely for review two important issues arising under FELA. The first is whether FELA courts should follow the majority rule by requiring that claims for damages for negligent infliction of emotional distress be supported by evidence of physical manifestation or other corroboration of emotional injury. Because FELA suits alleging exposure to asbestos are common–and often include allegations that the plaintiff suffers from emotional distress due to fear of cancer–this issue will continue to confront lower courts.

The other issue arises from the court's instruction which disregarded the principle of apportionment of damages in the face of evidence that some of the plaintiffs had significant exposure to asbestos at non-railroad jobs. This ruling fails to follow this Court's teachings on FELA jurisprudence, and misreads earlier decisions of this Court. Beyond the serious consequence on the defendant at bar (a total verdict of nearly $2.3 million), this issue is important because it is not uncommon for railroad employees to seek compensation under FELA where there is evidence that causes independent of the railroad employer's conduct are responsible for the employee's disabling condition. Given the open-ended nature of damage awards under FELA, a ruling which makes railroads responsible for non-work-related health conditions has serious consequences for the entire railroad industry.

The West Virginia Supreme Court declined to consider these two important issues. However, despite coming from a state trial court, this Court should review this case because, as a by-product of FELA's broad jurisdictional provision,

plaintiffs can take advantage of liability-expanding decisions in a handful of jurisdictions by bringing large numbers of out-of-state cases in those courts. The case below, coming out of West Virginia, is a stark example of this phenomenon.

ARGUMENT

I. THE ERRONEOUS RULINGS BY THE WEST VIRGINIA COURT WILL HAVE A FAR REACHING IMPACT ON THE RAILROAD INDUSTRY

The court below ruled that the principle followed by the majority of lower courts, as a means of putting reasonable limits on the potential for "nearly infinite and unpredictable liability" when plaintiffs allege emotional injuries, is to be disregarded in cases arising under FELA. Not only did the court fail to follow the prevailing common law rule, but litigation practices under FELA all but assure that this case will be of far greater significance to the railroad industry than would appear: it has the potential to impact FELA cases arising over vast geographic areas.

A. FELA Suits Alleging Exposure To Asbestos Are Commonplace And Frequently Are Funneled Into A Few Selected Jurisdictions

Though FELA was enacted primarily to provide compensation to railroad employees for the physical perils of the job, *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994), injuries caused by occupational exposure to harmful substances also are compensable. *Urie v. Thompson*, 337 U.S. 163 (1949)(exposure to silica dust compensable). While perhaps not quite the rule, today, FELA claims alleging an injury due to long-term occupational exposure are far from the exception. Railroads are defendants in a substantial number of FELA cases in which occupational

exposure to asbestos has been alleged, with the plaintiff often seeking compensation for, among other things, negligent infliction of emotional distress, claiming a fear of contracting cancer at a future time.[6] In many cases, as in the case below, the plaintiff's sole evidence of emotional distress is nothing beyond his or her testimony about fear or concern of contracting cancer.

In addition to alleging exposure to asbestos, it is not uncommon for plaintiffs to claim that exposure to other allegedly harmful substances in the workplace has caused an FELA "injury." *E.g., Baker v. Norfolk & Western Ry.*, 514 S.E.2d 448 (Ga. App. 1999)(exposure to diesel exhaust allegedly caused cancer); *Savage v. Union Pac. R.R.*, 67 F.Supp.2d 1021 (E.D. Ark. 1999)(plaintiff alleged exposure to "large amounts of toxic substances."); *Schmaltz v. Norfolk & Western Ry. Co.*, 878 F.Supp. 1119 (N.D. Ill. 1995)(plaintiff alleged exposure to herbicides caused his reactive airway dysfunction syndrome). Whenever there is an allegation that the plaintiff has been exposed to a substance that has been linked to cancer there is a potential claim for damages for emotional distress due to fear of cancer. Thus, the kind of evidence that is necessary to sustain a claim for emotional distress arising from the plaintiff's fear of some day contracting cancer is a potential issue in numerous lawsuits.[7]

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[6] From 1995 through 1999, over 6000 FELA suits were filed against railroads alleging occupational exposure to asbestos. Asbestos suits accounted for about 18.5 percent of all FELA suits filed during that period. These suits often are filed by retired workers. Data compiled from AAR surveys of railroads. *See supra* note 5.

[7] On May 18, 2001, a complaint was filed against CSX Transportation on behalf of a "class" of "several hundred to several thousand workers" alleging exposure to "hazardous organic solvents" claimed to increase the risk of cancer. *Rice et al. v. CSX Transp., Inc.*, (Circuit Court of Marshall

Not only are a large number of FELA cases with the potential for such a claim being brought, significant numbers of these cases tend to be filed in a handful of jurisdictions deliberately chosen because of perceived advantages to FELA plaintiffs. This patent forum shopping is facilitated by the broad venue provision of FELA, under which railroads are subject to the jurisdiction of the courts in any district in which the railroad does business. 45 U.S.C. § 56.[8] As a result, a large number of suits may be filed in a single jurisdiction, despite little connection between the facts and circumstances of the underlying cases and the forum state.[9] Moreover, even though FELA is a federal statute, plaintiffs can ensure that FELA cases will be heard in state court if deemed advantageous. While there is concurrent jurisdiction between state and federal court, if the plaintiff chooses state court as the forum, the case cannot be removed. 28 U.S.C. § 1445(a).

Cty., W. Va., filed May 18, 2001)(a copy of this complaint is lodged with the Court by *Amicus*).

[8] By the nature of their operations, the large railroads today do business in numerous states: Burlington Northern Santa Fe operates in 28 states; Union Pacific, Norfolk Southern and CSX each operate in 24 states. *See* Class I Railroad Annual Report to the Surface Transportation Board (Form R-1), submitted by each of these railroads pursuant to federal law.

[9] Some courts have held that FELA's venue provision justifies affording great flexibility to plaintiffs in selecting a forum, even beyond what might be appropriate for plaintiffs in general. *See Ford v. Burlington Northern R.R.*, 819 P.2d 169, 173-74 (Mont. 1991)(FELA "presents a justification for disparate treatment." *Id.* at 174.). In *Ford*, numerous out-of-state suits were filed in two particular Montana counties perceived to be favorable to plaintiffs, however, this Court declined to hold that the state's venue statute, which discriminated against out-of-state defendants, violated the Equal Protection Clause. *Burlington Northern R.R. v. Ford*, 504 U.S. 648 (1992). Under workers' compensation, venue is much more limited. A claim can only be brought in a forum that has a significant connection to the claim: for example, where the injury occurred or where the employment relationship was located. A. Larson & K. Larson, *Larson's Workers' Compensation Law*, § 143.01 (2000 ed.).

Consequently, a ruling by a single state court on an important issue arising under FELA can have far reaching effects. By channeling litigation into selected courts, plaintiffs can, and often do, take advantage of favorable rulings regardless of whether they reside, have worked, or claim to have been injured in the forum state. As a result, large railroads find a substantial portion of certain types of FELA claims being brought in a few select jurisdictions among the numerous states in which they operate, at levels far out of proportion with the number of its employees who live or work in that jurisdiction. [*See* Petition, Part III]

As demonstrated starkly by the Petition, West Virginia is a glaring example of this aspect of FELA litigation: there are 2,500 asbestos-related FELA suits pending in West Virginia, of which only a small percentage involves West Virginia resident plaintiffs. [*See* Petition at 27-28; Petitioner's Lodging].[10] Similarly, a few other jurisdictions which are considered favorable to plaintiffs have become magnets for FELA litigation.

A notorious example of this rampant forum-shopping occurred last year when a complaint was filed against a number of railroads in Jones County Mississippi by 990 plaintiffs alleging "exposure to asbestos and other hazardous substances." *Foster, et al. v. Kansas City Southern Ry. Co., et al.* (Civil Action No. 2000-141-CV9, Second Judicial District of the Circuit Court of Jones County, Mississippi, filed

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[10] Bringing cases from far and wide into West Virginia is nothing new. *See Norfolk & Western Ry. Co. v. Tsapis*, 400 S.E. 2d 239, 241 (W. Va. 1990)(921 FELA lawsuits brought in Brooke County, of which 704 involved non-West Virginia resident plaintiffs). Only about 3,000 railroad employees reside in the entire State of West Virginia. Association of American Railroads, *Railroad Facts* 57 (2000 ed.). Only six of the eighteen named plaintiffs in the *Rice* complaint, *see supra* note 7, reside in West Virginia; the others reside in Maryland, Kentucky and Georgia.

Sept. 27, 2000) (a copy of which is lodged with the Court by *Amicus*). Only about a quarter of the plaintiffs in this suit are Mississippi residents. Just as in the case below, the plaintiffs demand compensatory damages for "emotional upset, mental anguish . . . fear of cancer." In this suit brought in one Mississippi court, plaintiffs have sought to encompass practically the entire railroad industry.[11]

Not only does FELA's broad venue provision allows plaintiffs to choose from a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum. For example, to keep FELA cases in St. Louis, a jurisdiction perceived to be favorable for plaintiffs, a St. Louis doctor often is retained to "treat" the plaintiff. This will usually be enough to defeat a forum non conveniens motion even if the plaintiff neither lives nor was allegedly injured in Missouri.[12]

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[11] Named as defendants in this case are the Alabama Great Southern R.R., the Birmingham Southern R.R., the Burlington Northern & Santa Fe Ry. Co., CSX Transportation, Inc., the Kansas City Southern Ry. Co., the Pennington R.R., the Mississippi Central R.R., the Norfolk Southern Ry. Co., the St. Louis Southwestern Ry., Union Pacific R.R. and the National Passenger Railroad Corp. (Amtrak).

[12] *E.g., Jacobs v. Union Pacific R.R.*, No. 002-07409 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Illinois); *Branham v. Norfolk Southern Ry. Co.*, No. 002-06966 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides in Illinois, alleges injury in Indiana); *Pasley v. Union Pacific R.R.*, No. 002-06931 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(plaintiff resides and alleges injury in Arkansas); *Lennie v. Union Pacific R.R.* No. 002-07896 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Iowa). In all cases, the railroads' forum non conveniens motions were denied in March 2001, with the plaintiffs' receipt of medical treatment in St. Louis cited as a factor. (Copies of these orders are lodged with the Court by *Amicus*.)

B. This Case Presents An Excellent Opportunity For This Court To Address An Important Issue Left Unresolved In *Gottshall* And *Buckley*.

As petitioner demonstrates, this case raises an important issue over which lower courts are divided [*See* Petition pp. 17-18] and continue to reach conflicting results. For example, in two FELA cases in which several plaintiffs alleged fear of cancer as the result of asbestos exposure, a federal district court in Georgia recently reached the opposite result from the court below. In granting the defendant's motion for summary judgment, that court adopted

> the rule that applies in the vast majority of American jurisdictions: recovery for a claim of negligent infliction of emotional distress requires a plaintiff, in addition to showing impact under *Buckley*, to make a further showing of objective manifestation of that distress.

Dean, et al. v. CSX Transp., Inc., (S.D. Ga. 2000)(twelve plaintiffs)(unpublished order); *Heirs, et al. v. CSX Transp., Inc.*, (S.D. Ga. 2001)(six plaintiffs)(unpublished order) (copies of these orders are lodged with the Court by *Amicus*).

Though not ruling directly on the issue, the importance of addressing the question of what evidence is needed to sustain a claim for negligent infliction of emotional distress has been recognized by this Court in recent FELA cases. In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S.557 (1987), in response to concern raised by *amicus curiae* AAR that to permit a railroad worker to bring a FELA suit for an emotional injury arising from a condition that was subject to a grievance under the Railway Labor Act would inundate courts with "minor disputes" masquerading as FELA claims, this Court responded that AAR's concern "mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of *severe* emotional injury that has generally been required to establish liability for purely emotional injury." *Id.* at 566, n.13. (emphasis supplied)

While *Buell* did not address whether "purely emotional injuries were cognizable under FELA," that question was subsequently answered by this Court in the affirmative, but limited to cases where the employee is in the "zone of danger" of physical impact. *Gottshall*, 512 U.S. at 554-57.

Gottshall defined the universe of employees who may recover damages for emotional injury under FELA. Three years later, in *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997), this Court held that an employee who was exposed to a substance (in that case, asbestos) that might cause a future disease, but who had no manifestation of any physical injury, was not within the zone of danger and could not recover for emotional injury. While the holding was limited to plaintiffs alleging exposure but manifesting no symptoms of disease caused by the exposure, the majority opinion, as well as Justice Ginsburg's concurring and dissenting opinion, highlighted some of the inherent problems courts inevitably face in dealing with claims of emotional distress.

The Court pointed out that the question at issue was "the existence and seriousness of [the plaintiff's] claimed emotional distress." 521 U.S. at 433-34. After noting that "contacts . . . with serious carcinogens are common", *id.* at 434, the majority opinion summarized the problem:

> But how can one determine from the external circumstances of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk (say, from 23% to 28%) is reasonable and genuine, rather than overstated–particularly when the relevant statistics themselves are controversial and uncertain (as is usually the case), and particularly since neither those exposed nor judges or juries are experts in statistics? *The evaluation problem seems a serious one.* (emphasis supplied)

Id. at 435.

While Justice Ginsburg would not have limited recovery for emotional distress to employees within the zone of danger, *Gottshall*, 512 U.S. at 559 (Ginsburg, J., dissenting), her opinions in *Gottshall* and *Buckley* also recognize the importance of the issue raised by the case below. Justice Ginsburg concluded that the *Buckley* plaintiff was not entitled to damages for his alleged emotional injury because he "did not present objective evidence of severe emotional distress . . . . he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health." *Buckley*, 521 U.S. at 445.[13] Justice Breyer's majority opinion in *Buckley*, describing the evidentiary problems that inevitably arise in the context of emotional distress claims, underscored the consistency between the majority opinion and Justice Ginsburg's concurrence in assessing these problems: "And Justice Ginsburg, too, . . . would limit recovery in emotional injury cases to those who can show more objective evidence than *simply having expressed fear and concern* to supervisors." 521 U.S. at 434. (emphasis supplied).

In its limited holding in *Buckley*, this Court clearly reserved the important question presented by the case below, recognizing that it would continue to vex courts grappling with these difficult cases. This case presents the Court with an opportunity to resolve this critical question relating to the compensability of emotional distress claims under FELA which remains unanswered by *Gottshall* and *Buckley*.

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[13] In contrast, Justice Ginsburg noted that in *Gottshall* "[b]oth workers suffered severe injury on the job, . . . Both experienced not just emotional, but physical distress [weight loss, insomnia, cold sweats, fatigue, headaches and sleepwalking] . . . both [plaintiffs] satisfy the 'physical manifestation' test endorsed by the Restatement of Torts." 512 U.S. at 568-69 (Ginsburg, J., dissenting).

II. BY REFUSING TO GIVE AN APPORTIONMENT INSTRUCTION THE COURT BELOW MISINTERPRETED FELA AND EXPANDED RAILROAD LIABILITY WELL BEYOND THE STATUTE'S INTENT

This case raises a second critical, unresolved issue common under FELA. Again departing from the prevailing common law rule, the court below refused to recognize that in an FELA case, when there is evidence that causes other than the railroad's conduct contributed to the plaintiff's injury, the railroad should be liable for only the portion of the damages caused by its conduct. The trend toward FELA claims alleging occupational exposure to a harmful substance or condition has elevated the importance of the apportionment issue because often the health conditions allegedly caused by exposures at the workplace also may be caused by non-occupational factors or by non-railroad exposures.[14]

A. Except Where Congress Specifically Altered The Common Law, FELA Is To Be Guided By Common Law Principles: Nonetheless, The Court Below Ignored the Fundamental Common Law Principle That A Defendant Is Liable Only For The Harm It Caused

In *Gottshall*, this Court issued a reminder of a long-standing tenet of FELA: that railroads are not "insurers of the

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[14] Several years ago another West Virginia court also declined to recognize the right of apportionment in a case where the plaintiff alleged occupational exposure to asbestos, but where there was evidence that the plaintiff's obstructive lung disease was caused, at least in part, by his heart condition, obesity and cigarette smoking. *CSX Transp., Inc. v. Sirbaugh*, unpublished order, *cert. denied*, 520 U.S. 1139 (1997). No doubt, one of the benefits to plaintiffs of filing so many cases in West Virginia is the strong likelihood of avoiding submission of the issue of apportionment to the jury.

safety of [their] employees." 512 U.S. at 543; *See also Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947). Nonetheless, in the case below, the trial court took a significant step in the direction of conferring "insurer" status on the railroad industry. The court's refusal to provide instructions on apportionment of damages–in fact, the court instructed the jury to disregard the principle of apportionment–renders railroads liable for damages suffered by employees that the railroad did not cause. In embarking on this path, the court ignored another well established and fundamental, yet oft forgotten, feature of FELA: that FELA jurisprudence is to be guided by common law principles. "[T]he 'merit' of a FELA claim . . . cannot be ascertained without reference to the common law." *Gottshall*, 512 U.S. at 551.

A fundamental principle of the common law is that defendants are liable only for damages that are attributable to their negligence, not for damages that are caused by other, independent acts or conditions. Where two or more causes have combined to harm a plaintiff, only one of which is attributable to the defendant's negligence, damages should be apportioned among those causes, assuming there is a reasonable basis for determining the contribution of each cause to the harm. *Restatement (Second) of Torts* § 433A.[15]

There is no reason apportionment should not apply to FELA cases; while some courts, like the court below, disregard this principle, others have adhered to it.[16] In *Dale*

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[15] Traditional common law rules of apportionment applied to divisible harms. The modern common law is evolving toward the concept of several liability even for indivisible harms, based on the principle that each party should be responsible only for the harm it caused. *See Restatment (Third) of Torts: Apportionment of Liability* §§ 17, B18 (2000); Petition at 25.

[16] *See* cases cited in the Petition at 21-24.

v. Baltimore & Ohio R.R., 552 A.2d 1037 (1989), the Pennsylvania Supreme Court ruled that under FELA "liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused." *Id.* at 1041. The *Dale* court went on to hold that

> an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

Id.

In *Dale*, the plaintiff's injury was partially caused by exposure to asbestos on the job and partially by his pre-existing asthma. In this case, while there was an allegation of asbestos exposure while working for the defendant, there also was evidence that some of the plaintiffs were exposed similarly at other jobs, in some cases for a far longer period than their employment with the railroad. In *Dale*, the highest court in Pennsylvania corrected the erroneous reading of FELA by a trial court; in this case, the highest court in West Virginia has refused even to consider a similarly erroneous decision by a lower court.

B. Neither The Language Of FELA Nor This Court's Prior Decisions Alter The Common Law Rules Of Apportionment

The ruling below represents a striking example of how some courts, by deviating from common law principles, have misinterpreted FELA. The refusal of some courts to recognize the principle of apportionment of damages often grows out of a misreading of prior decisions of this Court, most notably

Rogers v. Missouri Pacific R.R., 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957).[17] In *Rogers*, after the Missouri Supreme Court reversed a jury verdict for a rail employee, this Court held that the language of § 51 of FELA requires submission of a case to the jury if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 506. *Rogers* was clear that its holding pertained only to the test for a jury case.[18] There was no discussion of apportionment in *Rogers*, nor any suggestion that FELA was meant to hold a railroad liable for damages it did not cause.

Rogers and its progeny have virtually assured that under FELA, assuming some competent evidence is proffered, a jury, and not a judge, will decide whether the elements of a negligence case have been proved by the plaintiff. Ironically, the court below prevented a jury from assessing properly the level of damages for which a defendant may be liable, in contrast to other courts which have recognized the important role of the jury on this issue. *E.g., Sauer v. Burlington Northern R.R.*, 106 F.3d 1490 (10th Cir. 1997)("Although apportionment may be difficult, like comparative negligence it is a question for which juries are well suited." *Id.* at 1494.)

Misinterpretation of *Rogers* by lower courts is not merely of academic interest: it has very real and serious financial consequences for railroads. The purpose of FELA is to

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[17] *See Farmer v. Pennsylvania R.R.*, 311 F.Supp. 1074, 1077 (W.D. Pa. 1970) and *Denton v. Southern Ry.*, 854 S.W.2d 885, 888 (Tenn. App. 1993), both citing to *Rogers* as justification for denying apportionment.

[18] "This Court granted certiorari to consider the question *whether the decision invaded the jury's function.*" 352 U.S. at 501. (emphasis supplied); "At best, uncertainty as to the facts arises from the petitioner's testimony, and in that circumstance not the court, *but the jury*, was the tribunal to determine the fact." *Id.* at 504. (emphasis supplied).

provide a remedy for injuries suffered on the job due to the employer's negligence, not a broad insurance plan for rail workers.[19] Rulings that do not allow for apportionment of damages for causes other than the railroad's negligence blur that distinction and render railroads liable for damages they did not cause. This grafts an expensive insurance feature onto an already rich compensation system, under which damages for both pecuniary and non-pecuniary losses are virtually unlimited.[20]

This judicially created insurance feature is especially relevant in the current environment which has seen myriad FELA cases alleging occupational illnesses. *See supra* pp. 5-6. In these types of cases, independent factors frequently may cause part of the worker's disability. Rejection of the right to apportion damages prevents railroad defendants, where there is supporting evidence, from having the jury consider that a plaintiff's condition is largely the result of the independent causes: for example, where exposure to asbestos is alleged, to non-railroad exposures, smoking or a condition unrelated to occupational exposure, such as asthma; and where occupational hearing loss is alleged, to noisy hobbies (e.g., shooting) or presbycusis (age-related loss of hearing).

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[19] Under a separate federal statute, many rail employees can qualify for an occupational disability benefit if disabled, by any cause, from performing their railroad job. 45 U.S.C.§231a(a)(1)(iv). This unique benefit, which is part of the Railroad Retirement system, is not available to Social Security employees. Rail employees are also eligible for benefits for total disability, as are Social Security workers. 45 U.S.C. § 231a(a)(1)(v).

[20] A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

By refusing to give jury instructions on apportionment generally recognized at common law, the court below expanded railroad liability under FELA far beyond the bounds that were intended by Congress. This case provides an excellent opportunity for this Court to correct that error and provide clear guidance to lower courts.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Circuit Court of Mingo County, West Virginia in this case should be granted.

Respectfully submitted,

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May 24, 2001